

Atty. Docket: 2884 (203-3592 PCT US)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants: Bruce Jankowski, *et al.* Examiner: Gloria R. Weeks
Serial No.: 10/540,197 Group: 3721
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For: Vacuum Assisted Surgical Stapler *Filed Via EFS-Web*
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REPLY BRIEF

Sir/Madam:

This Reply Brief is being submitted in response to the Examiner's Answer that was mailed on August 14, 2009 in connection with the above-identified patent application.

Claims 6, 19, 20, and 26 stand rejected under 35 U.S.C. §102(b) as being unpatentable over U.S. Patent No. 5,839,639 to Sauer, *et al.* (hereinafter "Sauer"). Appellants respectfully submit, however, that Sauer fails to disclose each and every element recited in Claims 6, 19, 20, and 26.

Under MPEP § 2131, "a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." See *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) (emphasis added).

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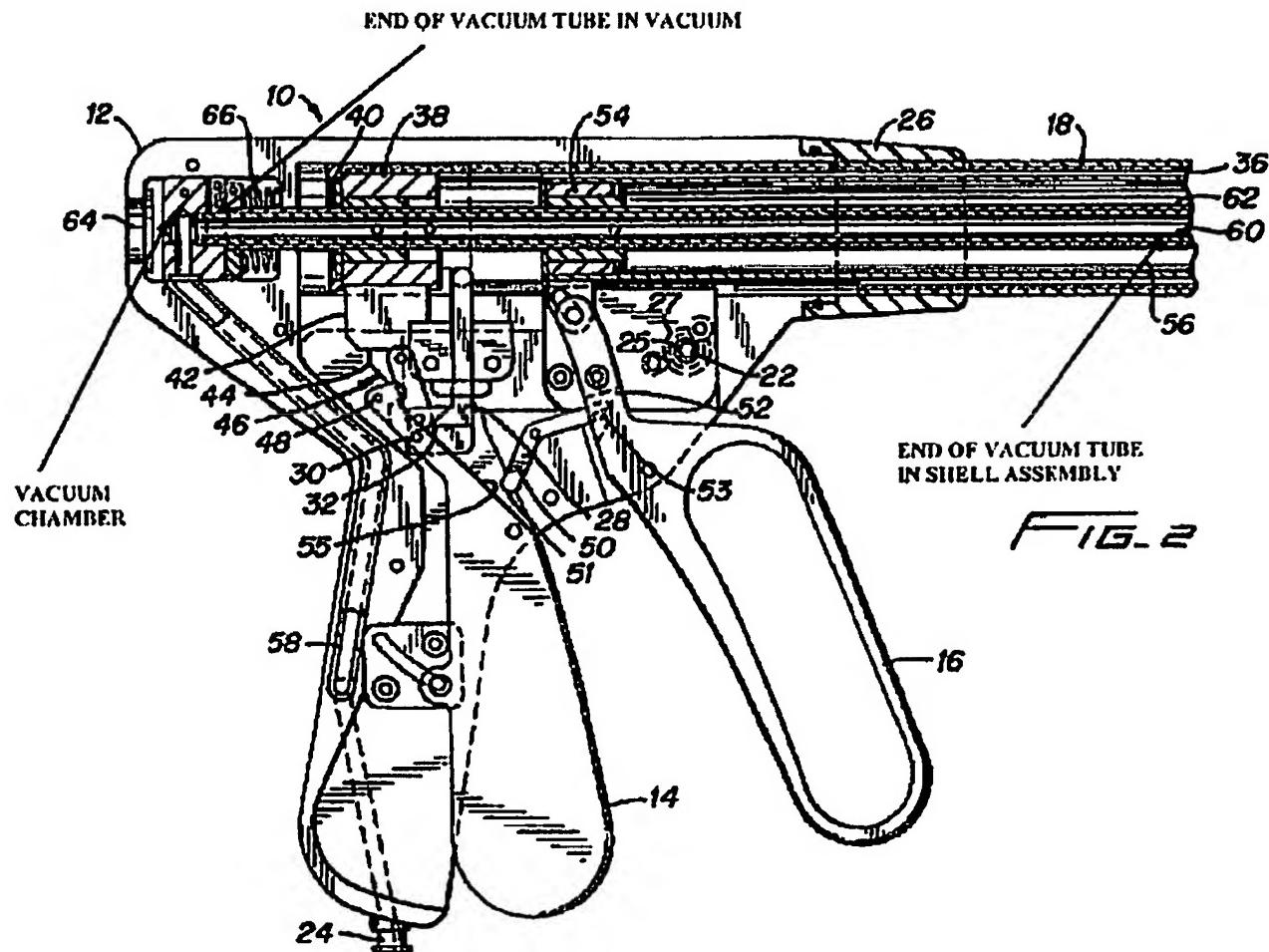
Dated: October 14, 2009

Tricia Tucci

Independent Claim 6 recites “[a] surgical stapling apparatus and vacuum system” incorporating “a surgical stapling apparatus” that includes “a body portion, a shell assembly and an anvil” wherein the “shell assembly” includes “an annular array of staples and at least one aperture,” as well as “a vacuum device including a housing and a vacuum conduit.” The claimed “housing” of the “vacuum device” is “positioned about at least a portion of the shell assembly of the surgical stapling apparatus to define a vacuum chamber” and “the at least one aperture” is “positioned within the vacuum chamber, the vacuum conduit communicating with the vacuum chamber.”

On page 4 of the Examiner’s Answer, referencing the annotated version of FIG. 2 reproduced below, the Examiner provided the following discussion and characterization of Sauer:

As shown in figure 2 of Sauer, housing 12 supports shell assembly 18 with the assistance of collar 26, such that housing 12 surrounds a portion of the shell assembly 18. The housing is found to meet the limitations of a vacuum chamber since claim 6 structurally defines a vacuum chamber as a housing structure about¹ a portion of the shell assembly. Examiner’s assessment of the structure is found to be further supported by the fact that the vacuum chamber of Sauer, as interpreted by Examiner, is in communication with a vacuum conduit 58 and at least one vacuum tube 60, such that a vacuum is transferred through the vacuum conduit (supported within housing) to the vacuum chamber (defined by housing) and subsequently the vacuum tube (supported within housing) for the purpose of allowing a tissue to be suctioned against an end anvil attached to an end of the vacuum tube.



Continuing, on page 5 of the Examiner's Answer, the Examiner argued that:

The housing 12 surrounds the shell assembly 18 such that an enclosed spaced that joins an end of the vacuum conduit 58 to the vacuum tube 60 is *defined* such that pressure loss is prevented between the vacuum conduit 58 and the vacuum tube 60. The vacuum chamber (*cross-hatched; see illustration below*) includes a first aperture that receives the vacuum conduit 58 and a second aperture that receives the vacuum tube. Examiner has interpreted the housing 12 of Sauer to be the collective structure that encloses the respective elements as claimed, the vacuum chamber is a cavity specifically outlined by a portion of the housing. Thus, the housing and vacuum chamber of Sauer are distinct elements. (Emphasis in original).

Appellants respectfully disagree with the Examiner's characterization of the structure disclosed in Sauer.

As can be appreciated through reference to the annotated version of FIG. 2 above, there is no space between the elements identified by the reference characters 12 and 18, i.e., Sauer's housing and outer tube, respectively. Thus, elements 12 and 18 cannot collectively define the "chamber" recited in the claims.

Even if it could be properly assumed, *arguendo*, that a space is defined between elements 12 and 18, Sauer fails to disclose any structure that is in communication with that space whatsoever. In response to the argument presented on page 4 of the Examiner's Answer that "the vacuum chamber of Sauer, as interpreted by Examiner, is in communication with a vacuum conduit 58 and at least one vacuum tube 60, such that a vacuum is transferred through the vacuum conduit (supported within housing) to the vacuum chamber (defined by housing)," as was pointed out in the Substitute Appeal Brief filed on May 20, 2009, Sauer states that the "vacuum passage 58 . . . extends between the vacuum connection port 24" and that the "air delivery tube 60," which "provide[s] a source of vacuum or suction to the collapsible anvil assembly 20," (col. 7, lines 28-33), and that once a source of vacuum is connected to the vacuum connection 24 and turned on, "it creates a source of vacuum through vacuum passage 58 and thus through air delivery tube 60." (Col. 9, lines 63-64). Consequently, any vacuum established by the Sauer device extends from the source of vacuum 24 to the anvil assembly 20 through the vacuum passage 58 and the air delivery tube 60. In other words, the vacuum exists solely within the confines of the vacuum passage 58 and the air delivery tube 60. Since the vacuum passage 58, the vacuum connection port 24, the air delivery tube 60, the anvil assembly 20, and the vacuum connection 24 are each completely devoid of any structure, e.g., perforations, apertures, or the like, that is in

communication with the “space” purportedly in existence between elements 12 and 18, there can be no creation of negative pressure in the alleged “space,” and thus, no vacuum. Therefore, Appellants respectfully submit that the “space” allegedly defined between elements 12 and 18 cannot be properly characterized as the claimed “vacuum chamber.” (Emphasis added).

In response to the argument that “[t]he housing 12 surrounds the shell assembly 18 such that an enclosed spaced that joins an end of the vacuum conduit 58 to the vacuum tube 60 is *defined* such that pressure loss is prevented between the vacuum conduit 58 and the vacuum tube 60” advanced on page 5 of the Examiner’s Answer, (emphasis in original), Appellants respectfully submit that the Examiner’s conclusions constitute no more than baseless conjecture that is completely unsupported by the Sauer disclosure. There is nothing in Sauer that would allow one of ordinary skill to reasonably conclude that the structure identified by the Examiner as the claimed “vacuum chamber” is either inclusive of an interior space, or in communication with the vacuum source 24. Consequently, Appellants respectfully maintain that Sauer fails to disclose the “vacuum chamber” recited in the claims.

Additionally, since the only vacuum created within the Sauer device exists solely within the confines of the vacuum passage 58 and the air delivery tube 60, the single structure in Sauer that is reasonably comparable to the recited “vacuum chamber” lies within, and between, the vacuum connection port 24, the vacuum passage 58, and the air delivery tube 60. As can clearly be appreciated through reference to FIG. 2 above, however, this structure is not defined between the handle housing 12 and the outer tube 18, which were respectively characterized by the Examiner as the “housing” of the “vacuum device” and the “shell assembly” recited in the claims. Therefore, Appellants renew the argument that Sauer fails to disclose, or even suggest, “a vacuum device including a housing . . . positioned about at least a portion of the shell

assembly of the surgical stapling apparatus to define a vacuum chamber," as recited in independent Claim 6.

For at least these reasons, *inter alia*, Appellants respectfully submit that Sauer fails to disclose each and every element recited in independent Claim 6, and therefore, that Sauer fails to anticipate the claimed subject matter. As such, Appellants respectfully submit that independent Claim 6 is allowable over Sauer under 35 U.S.C. §102(b). Since Claims 19, 20, and 26 depend either directly or indirectly from independent Claim 6, and include each element recited therein, for at least the reasons that independent Claim 6 is allowable over Sauer under 35 U.S.C. §102(b), *inter alia*, Appellants respectfully submit that Claims 19, 20, and 26 are also allowable over Sauer under 35 U.S.C. §102(b).

Claim 7 also stands rejected under 35 U.S.C. §103(a) as being unpatentable over Sauer. Appellants respectfully submit, however, that Sauer fails to render the subject matter of Claim 7 obvious.

As a condition for patentability, 35 U.S.C. §103(a) indicates that "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art," then the subject matter is not patentable. (Emphasis added).

In the Examiner's Answer, the Examiner argued that while Sauer discloses only a single vacuum tube 60, rather than a plurality of vacuum tubes, as recited in Claim 7, the incorporation of additional tubes would have been obvious to one of ordinary skill in the art. (*See* Examiner's Answer, page 3).

Assuming, *arguendo*, that incorporating additional vacuum tubes into the Sauer apparatus would have been obvious to one of ordinary skill in the art, incorporating these additional tubes would fail to cure the aforescribed deficiencies in Sauer.

For at least this reason, *inter alia*, Appellants respectfully submit that Sauer fails to suggest the subject matter of independent Claim 6 as a whole, and therefore, that Sauer fails to render the subject matter of independent Claim 6 obvious. As such, Appellants respectfully submit that independent Claim 6 is allowable over Sauer under 35 U.S.C. §103(a). Since Claim 7 depends directly from independent Claim 6, and includes each element recited therein, for at least the reasons that independent Claim 6 is allowable over Sauer under 35 U.S.C. §103(a), *inter alia*, Appellants respectfully submit that Claim 7 is also allowable over Sauer under 35 U.S.C. §103(a).

Respectfully submitted,



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